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No. 88-121

Supreme Court, U.S.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

LARRY D. BARNETTE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT*

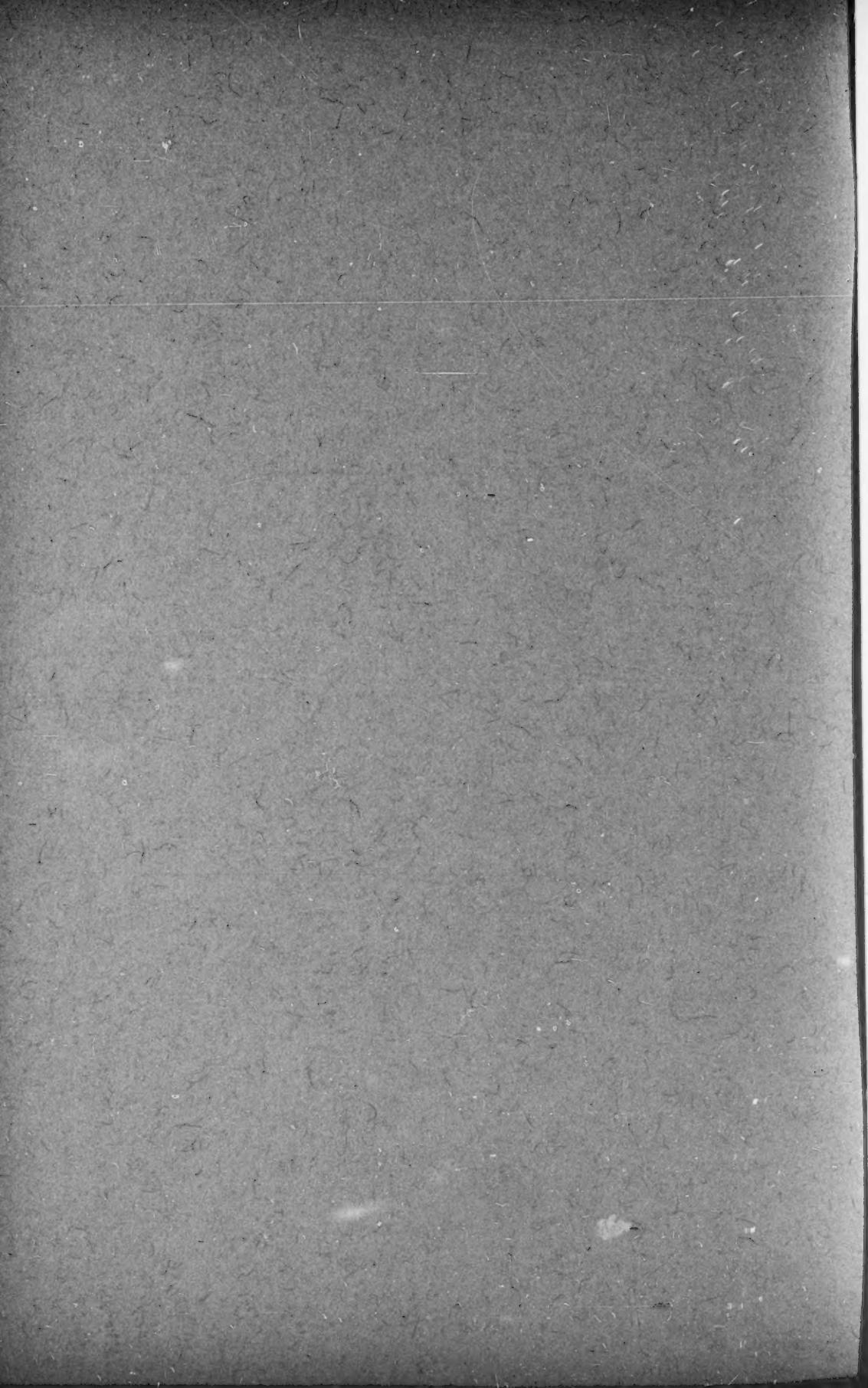
BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, where petitioners complied with the district court's requirement that they deposit with the court, pending appeal, the full amount of court-ordered restitution and fines awarded to the United States, it was proper to award to the United States interest on the money deposited commencing with the date originally set by the district court for payment of the restitution and fines.

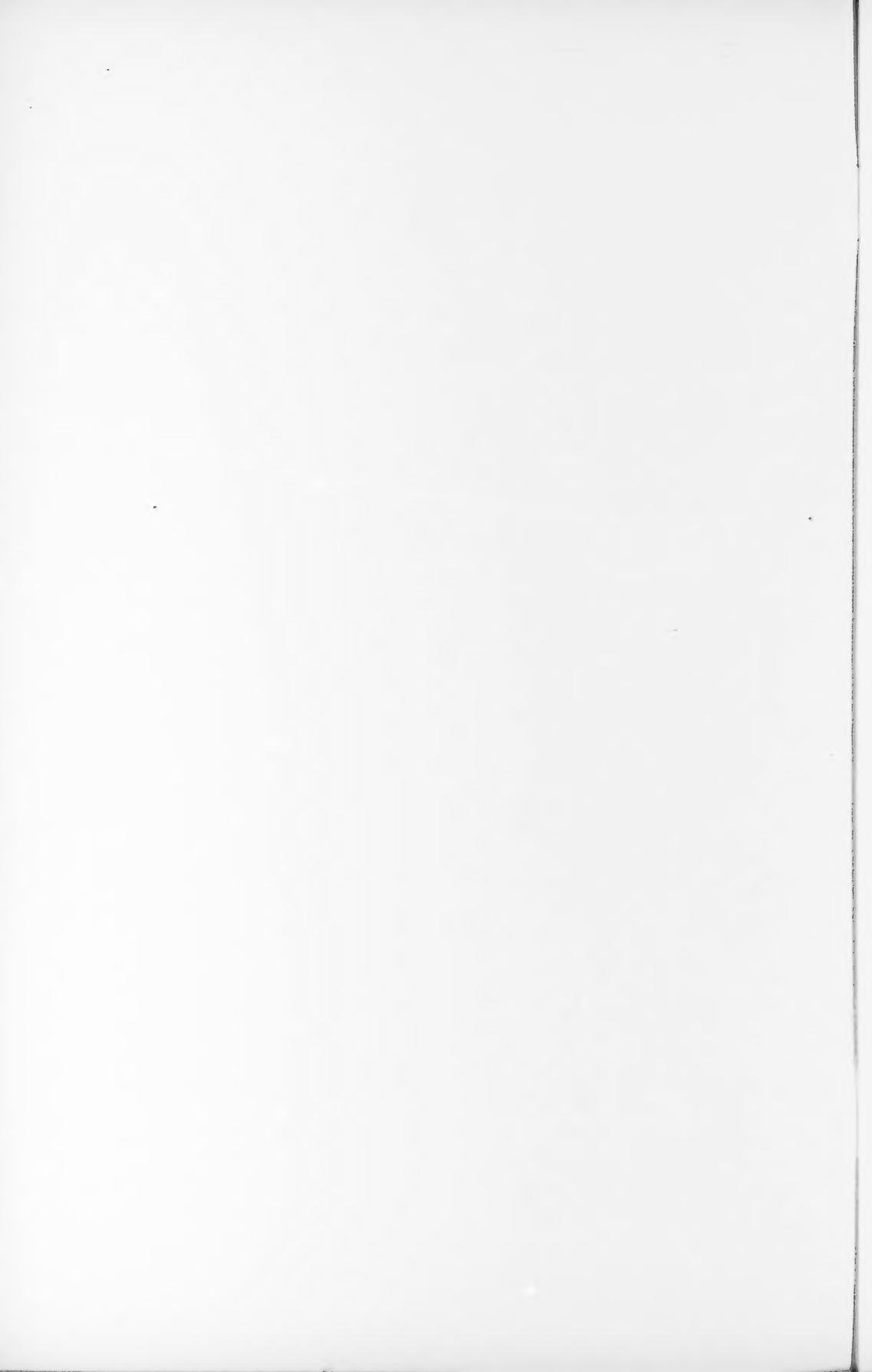


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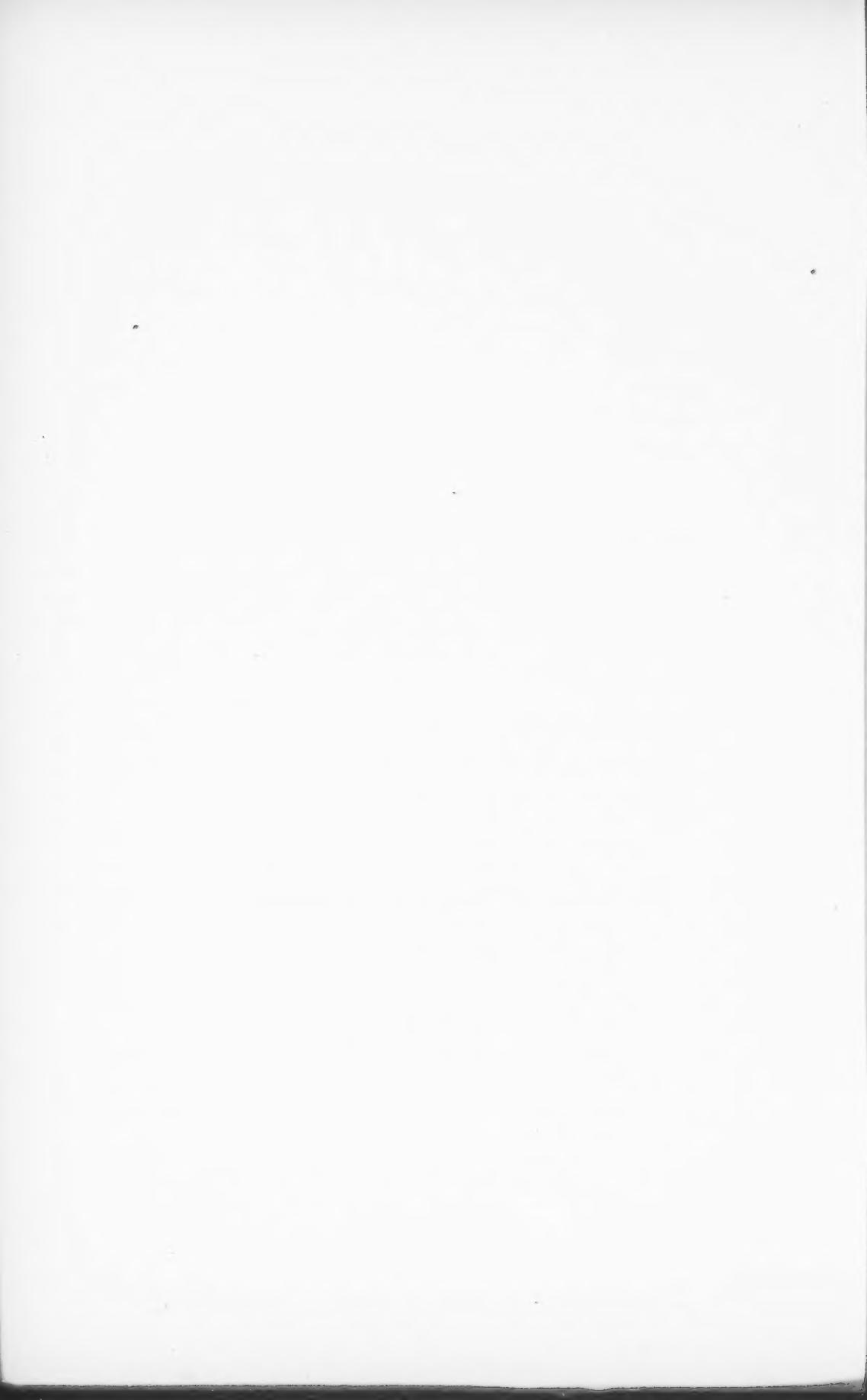
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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court orders of December 13, 1984 (App., *infra*, 1a-4a, 5a-6a), granting petitioners' stays pending appeal and ordering the posting by each petitioner of the amounts of court-ordered restitution and fines, and of March 11, 1987 (App., *infra*, 7a-9a), disbursing to the United States the amounts of restitution and fines deposited with the court, and the interest thereon, and the opinion of the court of appeals (Pet. App. 1a-9a), are all unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 5, 1988. A petition for rehearing was denied on May 31, 1988 (Pet. App. 10a-11a). The petition for a writ of certiorari was filed on July 20, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

(1)

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioners were convicted of a variety of offenses arising from their fraudulent government contracting practices (Pet. App. 2a). Petitioner Barnette was sentenced to a total of five years' imprisonment and ordered to pay \$7 million in restitution to the government (Pet. App. 3a). Petitioner Allied Management Corporation was fined \$71,000, and petitioner Jets Venture Capital Corporation was fined \$2,000 (*ibid.*).

1. The judgment and commitment order as to petitioner Barnette specified that the restitution was to be paid within the first year of Barnette's confinement, and Barnette's surrender date was set for January 10, 1985 (Pet. App. 3a). The judgment and commitment orders as to petitioners Allied Management Corporation and Jets Venture Capital Corporation specified that the corporate fines were to be paid within 90 days of the date of judgment (*ibid.*). Petitioners thereafter filed motions to stay the judgment pending appeal, which were granted by the district court on December 13, 1984 (App., *infra*, 1a-4a, 5a-6a). The motion as to petitioner Barnette was granted upon the condition that Barnette "post[] by January 10, 1985, either the ordered restitution in the amount of \$7 million with the Clerk of the Court, to be placed in an interest bearing account during the pendency of the appeal, or a bond in an equivalent amount * * *" (App., *infra*, 4a). The stay order further provided that any interest accruing on the deposited funds was to remain in the registry of the court (*ibid.*). As to petitioners Allied Management Corporation and Jets Venture Capital Corporation, the court granted the stay upon the condition that petitioners "post with the Clerk of the Court a certificate of deposit as

collateral for the payment of the fines" (App., *infra*, 5a-6a). Again, the order specifically provided that any interest accruing on the funds should remain in the registry of the court (*id.* at 6a). On January 10, 1985, petitioners posted the full amount of the restitution and fines with the clerk of the court in the form of one-year certificates of deposit (Pet. App. 3a-4a).

Petitioners' appeal was still pending when the certificates of deposit matured in January 1986, and petitioners moved for renewal of the certificates and return of accrued interest (Pet. App. 4a). The district court ordered the clerk to renew the certificates of deposit, but deferred ruling on petitioners' request for the interest pending resolution of the appeal (*ibid.*).

On October 8, 1986, the court of appeals affirmed petitioners' convictions and sentences (with the exception of one sentence on one count) (Pet. App. 4a). See *United States v. Barnette*, 800 F.2d 1558 (11th Cir. 1986), cert. denied, 480 U.S. 935 (1987). Petitioner Barnette commenced serving his term of imprisonment on December 4, 1986 (Pet. App. 4a). The government moved for disbursement of the funds in the court registry (*ibid.*). On March 11, 1987, the district court ordered that the funds and all accrued interest be disbursed to the government (App., *infra*, 7a-9a). In its order the court stated: "When staying the Judgments to allow [petitioners] to appeal, it was the intention of the Court to require [petitioners] to pay the restitution and fines imposed. While these sums were retained in the Registry of the Court pending appeal, it was not the Court's intention to return interest accumulated on these funds if the Judgments were affirmed" (*id.* at 8a). The court subsequently stayed its disbursement order pending appeal (Pet. App. 5a).

2. The court of appeals vacated the order of the district court and remanded for further proceedings (Pet.

App. 1a-9a). The court held that petitioner Barnette was entitled to the interest that had accrued on the funds prior to January 10, 1986 (Pet. App. 7a). The court reasoned that if Barnette had not pursued an appeal, his restitution payment would have come due on that date, one year after he would have commenced his term of imprisonment had there been no appeal and stay. Awarding the interest earned on the \$7 million during that year would thus have constituted "an impermissible burden on Barnette's right to appeal" (*ibid.*). The court held, however, that the government was entitled to any interest earned on the funds after January 10, 1986 (Pet. App. 7a-8a). The court explained that awarding the government interest accruing after that date "simply gives the Government what it would have had were there no appeal and had the money been paid when due," and that it "furthers the trial court's expressed intention that the appeal should not delay payment of the ordered restitution" (*id.* at 8a).

As to the the corporate petitioners, Allied Management Corporation and Jets Venture Capital Corporation, the court found that their fines were to be paid within 90 days of the date of judgment, or by February 2, 1985 (Pet. App. 8a-9a). Accordingly, they were entitled to interest accruing on their bonds between January 10, 1985 and February 2, 1985; the balance of the accrued interest was to be paid to the government (*id.* at 9a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, certiorari should be denied.

Petitioners make a two-part challenge to the order of the district court, as modified by the appeals court, awarding the government interest that accrued on the funds after the original due dates of the fines and restitution.

First, they argue (Pet. 8-12) that the district court had no authority to award interest on the sum of money deposited in the district court registry pending appeal to secure the payment of court-ordered restitution and fines. Second, they argue (Pet. 12-16) that the order awarding interest to the United States violated the Double Jeopardy Clause because it increased their sentences following an affirmance on appeal of their convictions. Neither of these claims has merit.

1. The Victim and Witness Protection Act of 1982 authorizes a sentencing court to impose an order of restitution "in addition to or * * * in lieu of any other penalty authorized by law" (18 U.S.C. (Supp. IV) 3663(a) [previously, 18 U.S.C. 3579(a)(1)]).¹ The Act gives the sentencing court broad discretion to determine the timing of payment of restitution (18 U.S.C. (Supp. IV) 3663(f) [18 U.S.C. 3579(f)]). The Act provides that the court may require that restitution be made "within a specified period or in specified installments" (§ 3663(f)(1) [§ 3579(f)(1)]) or, if not otherwise provided by the court, that restitution shall be made immediately (§ 3663(f)(3) [§ 3579(f)(3)]). The broad authority granted the court under the Act is consistent with the well accepted principle that a trial court has wide discretion in setting criminal sentences. See *Solem v. Helm*, 463 U.S. 277, 290 (1983).

The district court is given similarly broad discretion in determining whether, and under what conditions, to grant

¹ This provision has recently been renumbered. The certiorari petition cites the previous United States Code designations of the sections of this provision, which are hereinafter provided in brackets following the current Code citations.

a stay of execution of sentence pending appeal. Thus, Fed. R. Crim. P. 38(e) provides:

A sanction imposed as part of the sentence pursuant to [18 U.S.C. (Supp. IV) 3663 [3579]] may, if an appeal of the conviction or sentence is taken, be stayed by the district court or by the court of appeals upon such terms as the court finds appropriate. The court may issue such orders as may be reasonably necessary to ensure compliance with the sanction upon disposition of the appeal, including the entering of a restraining order or an injunction or requiring a deposit in whole or in part of the monetary amount involved into the registry of the district court or execution of a performance bond.

Similarly, Fed. R. Crim. P. 38(c) grants a district court discretion to stay a sentence to pay a fine, pending appeal, "upon such terms as the court deems proper." Here, the district court's orders granting petitioners' motions for stay of execution pending appeal were conditioned on the requirement that any interest accruing on the deposited funds was to remain in the registry of the Court (App., *infra*, 4a, 6a). Indeed, in ordering the disbursement of the interest that had accrued on the \$7 million posted by petitioner Barnette, the district court unequivocally stated that, at the time it stayed the judgments to allow petitioners to appeal, it was the intention of the court to require petitioners to pay the court-ordered amounts and, if the judgments were affirmed, not to return the interest accumulated on these funds (App., *infra*, 8a). The court of appeals modified the condition that interest be retained by returning a portion to petitioners so as not to burden petitioners' right to take an appeal. The district court's authority to determine the conditions of stay, as so modified, was fairly encompassed by Rule 38(e), which authorizes a district court to condition a stay pending appeal "upon such terms as the court finds appropriate."

2. As the court of appeals recognized (Pet. App. 6a), a trial court cannot penalize a defendant for pursuing an appeal from his conviction. *North Carolina v. Pearce*, 395 U.S. 711, 723-724 (1969). Contrary to petitioners' assertion (Pet. 13-16), the result reached by the court of appeals did not penalize petitioners for pursuing an appeal by increasing their sentences because petitioners incurred no increase in their sentences following affirmance of their convictions. Under the terms of his sentence, petitioner Barnette's restitution payment would have been due January 10, 1986—one year after he would have commenced his term of imprisonment had there been no appeal and stay. Similarly, under the terms of their sentences, petitioners Allied Management Corporation and Jets Venture Capital Corporation were to pay their fines by February 2, 1985. Accordingly, the award to the government of interest accruing after those dates "simply [gave] the Government what it would have had were there no appeal and had the money been paid when due" (Pet. App. 8a), and thus did not constitute an improper increase of sentence.²

² The Fifth Circuit's decision in *Barnes v. United States*, 223 F.2d 891 (1955), cited by petitioners (Pet. 13), fails to support petitioners' argument that the district court penalized petitioners' decision to appeal. In *Barnes*, the district court order required as a condition of stay pending appeal that the defendant pay court costs if the conviction were affirmed. The appeals court vacated the order on review because the district court lacked power to condition a stay bond "upon an increase of the sentence in the event of an affirmance" (223 F.2d at 893).

Unlike in *Barnes*, the condition the district court below imposed on the stay pending appeal did not increase petitioners' sentences. The sum in the amount of court costs would have been retained by the defendant in *Barnes* had he not appealed. In contrast, if petitioners in the instant case had not appealed, they would *not* have been entitled to the interest accruing after the due date of their fines and restitution; the government would have retained that money. Thus, unlike the

3. Petitioners contend (Pet. 11) that the decision of the court of appeals conflicts with *United States v. Jacob Schmidt Brewing Co.*, 254 F. 714 (D.N.D. 1918). There, the defendant was convicted of a liquor offense and sentenced to a \$7,250 fine. The defendant took an appeal from the judgment and posted a stay bond. His conviction was ultimately affirmed. The issue before the court of appeals was whether the government was entitled to interest upon the judgment from the date it was entered to the time of its payment following affirmation of defendant's conviction. Because there was no statute providing for interest on judgments in criminal cases as there was for interest on judgments in civil cases, the court held that the government was not entitled to interest upon the judgment.

The holding in *Jacob Schmidt Brewing* plainly does not govern the instant case. In that 1918 decision, no time for the payment of the fine was set forth by the district court. Here, the original terms of the district court's sentences set a definite time for payment of restitution and fines. In ordering the posting of the full amount of the restitution and fines, the district court intended that such posting would itself constitute the actual transfer of those funds with nothing to be returned to petitioners unless the district court judgment was reversed (App., *infra*, 8a). Although the court of appeals correctly vacated that aspect of the district court's order that penalized petitioners for their decision to take an appeal, its decision to give sway to the district court's intention that the restitution and fines be treated as a completed transfer (with subsequent interest going to the United States as early as

defendant in *Barnes*, petitioners incurred no additional liability by choosing to exercise their right to appeal because their penalty after affirmation on appeal was no greater than that imposed in the first instance.

legally permissible) was proper and consistent with *Jacob Schmidt Brewing*. Since there is no reason to doubt that the district court had discretion to deny a stay of execution with regard to the order of restitution (18 U.S.C. (Supp. IV) 3663(f) [18 U.S.C. 3579(f)]; Fed. R. Crim. P. 38(e)), and the fines (Fed. R. Crim. P. 38(c)), the court certainly had the power to require their payment on the schedule that would have governed had no appeal been taken.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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SEPTEMBER 1988



APPENDIX A

UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF FLORIDA JACKSONVILLE DIVISION

Case No. 83-131-Cr-J-14

UNITED STATES OF AMERICA, PLAINTIFF

vs.

LARRY D. BARNETTE, ET AL. DEFENDANT

[Filed Dec. 13, 1984]

ORDER GRANTING MOTION TO STAY

This case came on to be heard on the defendant Larry D. Barnette's Motion to Stay Sentence and to Grant Post-Conviction Release, filed herein on November 13, 1984. On that same date the defendant filed his Notice of Appeal to the United States Court of Appeals for the Eleventh Circuit. The government filed its memorandum in opposition on November 16, 1984. At the hearing held on this motion on December 4, 1984, the Court requested that the parties file supplemental memoranda addressing the effect of provision 18 U.S.C. § 3143(b) of the Comprehensive Crime Control Act [hereinafter "section 3143(b)"] on defendant's motion. The government filed its supplemental memorandum on December 7, 1984, and the defendant filed his on December 12, 1984. A second hearing w[a]s held on the defendant's motion on December 13, 1984.

On October 12, 1984, the President signed into law the Comprehensive Crime Control Act of 1984. Public Law 98-473. The government's position is that in order to be

(1a)

granted post-conviction release under section 3143(b) of the Act the defendant bears the burden of demonstrating that:

1. He is not likely to flee,
2. He does not pose a danger to the safety of any other person or to the community,
3. He is not appealing for the purpose of delay, and that
4. He is raising by his appeal substantial questions of law or fact likely to result on reversal of his conviction or an order for new trial.

As to the second and third factors, having presided through the extensive pretrial and trial proceedings in this case, and having reviewed the memoranda regarding this motion as well as other pleadings relevant to this matter, the Court finds that the defendant does not pose a danger to the safety of others or to the community, and that his appeal is not taken for the purpose of delay. Therefore, the second and third requirements of section 3143(b) have been met.

As to the fourth factor, the Court will review the parties' positions and discuss the issues raised by the recent passage of section 3143(b). The government states that Congress sought, in enacting section 3143, to recognize the presumed correctness of convictions, to address community safety needs in considering post-conviction bail, and to eliminate dilatory appeals. *See S. Rep. No. 225, 98th Cong., 2d Sess. (1984).* In this respect, requiring a defendant to demonstrate the fourth factor is pivotal to effecting Congress' goals. The defendant responds that it would be "ridiculous" to believe that Congress enacted a law requiring the trial judge who heard the case and who ruled on the motions presented in the case to state that the court was probably in error and that an appellate court would likely reverse. The defendant submits that the new language

should be construed in substantially the same manner as the former language requiring that the appeal not be "frivolous". The Court agrees with the defendant that were the Court to make the finding that reversal in this case is likely, as required by section 3143(b), the Court would have granted the defendant's previously filed motion for new trial. The Court does not agree with the defendant's suggestion that the former "frivolous" standard should be relied on in interpreting the fourth requirement of section 3143(b). If Congress had so intended, it would not have specifically changed that language. Faced with determining the proper application of section 3143(b), the Court is once again compelled in this case to deal with an issue of first impression.

The Court finds upon its review of the file that the defendant's appeal does not raise a substantial question of law or fact likely to result in reversal or an order for new trial. However, the Court recognizes that this case involved many novel questions of law for which no precedent has been established. While the Court at all times made rulings it felt to be legally correct, in many instances the legal issue involved was one of first impression. Such issues are appropriate for appellate review. The Court finds that appellate review of this case would have precedential benefit and that the existence of issues of first impression is sufficient to meet the fourth requirement of section 3143(b).

As to the first factor, likelihood of flight, the government concludes that the defendant is likely to flee because he is a convicted felon who has received concurrent five (5) year incarceration sentences on 14 separate criminal violations. As a result of his convictions he is further obligated to repay the government in excess of \$7 million in restitution and fines. The government further contends that a substantial portion of his assets are located outside the

United States and that most of his remaining assets consist of stock in several American corporations that could be controlled from a location outside the United States. In addition to the factors cited by the government, the Court is aware that the defendant's wife and child are currently residing in Europe. *See page 14 of the Presentence Investigation Report on Larry D. Barnette.* The Court finds, however, that the defendant's appearance can be assured by a condition of release requiring that the defendant post either the ordered restitution with the Clerk of the Court, to be placed in an interest bearing account during the pendency of the appeal, or a bond in an equivalent amount.¹

Upon consideration, it is

ORDERED AND ADJUDGED:

1. That the defendant Larry D. Barnette's Motion to Stay and to Grant Post-Conviction Release, filed herein on November 13, 1984, is granted.
2. That the defendant is permitted to remain at liberty pending appeal from the Judgment of Conviction on the bond previously posted. To insure his appearance at all future proceedings his release is further conditioned on the defendant posting by January 10, 1985, either the ordered restitution in the amount of \$7 million with the Clerk of the Court, to be placed in an interest bearing account during the pendency of the appeal, or a bond in an equivalent amount; any interest accruing thereon to remain in the registry of the Court.

ORDERED at Jacksonville, Florida, this 13 day of December, 1984.

/s/ SUSAN H. BLACK
United States District Judge

¹ The Court's finding is based not only on its review of the entire file but also the *in camera* documents file with the Court and attached to its order dated October 15, 1984.

APPENDIX B

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION**

Case No. 83-131-Cr-J-14

UNITED STATES OF AMERICA, PLAINTIFF

vs.

LARRY D. BARNETTE, ET AL. DEFENDANT

[Filed Dec. 13, 1984]

ORDER

This case is before the Court on the Defendants Allied Management Corporation and Jets Venture Capital Corporation's Motion for a Stay of the Payment of Fines Pending Appeal, filed herein on November 13, 1984. The government's memorandum in opposition was filed on November 16, 1984.

The defendants filed their notice of appeals from this Court's adjudication and sentence to the United States Court of Appeal for the Eleventh Circuit on November 13, 1984. The defendant Allied Management Corporation seeks a stay of its payment of fines totalling \$71,000.00 which are to be paid within 90 days from the date of the Judgment entered on November 2, 1984. A stay is also sought by the defendant Jets Venture Capital Corporation which is required to pay fines totalling \$2,000.00 within 90 days from the date of the Judgment entered on November 2, 1984. The defendants state their willingness to post with

the Clerk of the Court a certificate of deposit as collateral for the payment of the fines should the Court grant the requested stays. The government is in basic agreement with the defendants' suggestion but would have the interest accruing during the pendency of the appeal remain in the Court registry. The Court agrees that the interest should remain in the registry until its disposition is finally determined.

Upon consideration, it is

ORDERED:

1. That defendants Allied Management Corporation and Jets Venture Capital Corporation's Motion For a Stay of the Payment of Fines Pending Appeal, filed herein on November 13, 1984, is granted.
2. That the defendants have 30 days in which to post with the Clerk of the Court a certificate of deposit issued by a banking institution which is insured under provisions of federal law in an amount totalling \$73,000.00, the interest accruing thereon to remain in the registry of the Court.

ORDERED at Jacksonville, Florida, this 13 day of December, 1984.

/s/ SUSAN H. BLACK

United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF FLORIDA JACKSONVILLE DIVISION

Case No. 83-131-Cr-J-14

UNITED STATES OF AMERICA,

vs.

LARRY D. BARNETTE, ET AL.

[Filed Mar. 11, 1987]

ORDER

This case is before the Court on the Motion For Order Requiring (1) The Clerk Of This Court To Disburse To The United States Army The \$7,000,000 Restitution Posted With The Clerk And All Interest That Has Accrued Thereon And (2) The Corporate Defendants To Pay Their Fines Forthwith, filed herein on January 29, 1987. Defendants LARRY D. BARNETTE, ALLIED MANAGEMENT CORP. and JETS VENTURE CAPITAL CORP. filed their response in opposition on February 9, 1987. Defendant BARNETTE's Addendum to his response was filed February 12, 1987. The government filed a response on February 13, 1987. In addition, a Motion To Stay Payment Of Interest On Allied Management Corporation Fine Of \$71,000.00 And Jets Venture Capital Corporation Of \$2,000.00 was filed on February 27, 1987.

The Court has reviewed the motions and memoranda filed by the parties. The Court finds that the government's

response, filed February 13, 1987, accurately reflects the procedural history and intention of the Court regarding defendant BARNETTE's deposit of \$7,000,000.00 into the Registry of the Court. The government's response also characterizes accurately the Court's intention with regard to ALLIED MANAGEMENT CORP.'s and JETS VENTURE CAPITAL CORP.'s deposits into the Registry of the Court. When staying the Judgments to allow the defendants to appeal, it was the intention of the Court to require the defendants to pay the restitution and fines imposed. While these sums were retained in the Registry of the Court pending appeal, it was not the Court's intention to return interest accumulated on these funds if the Judgments were affirmed. Therefore, the Court will direct the Clerk of the Court to pay the amounts currently held in the Registry of the Court along with all interest to the appropriate parties. In light of this determination, the Court will deny the motion to stay.

Accordingly, it is

ORDERED:

1. That the Motion For Order Requiring (1) The Clerk Of This Court To Disburse To The United States Army The \$7,000,000 Restitution Posted With The Clerk And All Interest That Has Accrued Thereon And (2) The Corporate Defendants To Pay Their Fines Forthwith, filed herein on January 29, 1987, is granted.
2. That the Clerk of the Court is hereby directed to issue to the United States Attorney's Office in Jacksonville, a check made payable to the United States Army for the amount presently deposited in the Registry of the Court from defendant LARRY D. BARNETTE's restitution in the amount of \$7,000,000.00, plus all interest accumulated.

3. That the Clerk of the Court is hereby directed to pay to the United States the amounts deposited into the Registry of the Court by defendants **ALLIED MANAGEMENT CORP.** and **JETS VENTURE CAPITAL CORP.** for the fines imposed in the amounts of \$71,000.00 and \$2,000.00, respectively, plus all interest accumulated.

4. That the Motion To Stay Payment of Interest On Allied Management Corporation Fine Of \$71,000.00 And Jets Venture Capital Corporation Of \$2,000.00, filed herein on February 27, 1987, is denied.

DONE AND ORDERED at Jacksonville, Florida, this 11 day of March, 1987.

/s/ SUSAN H. BLACK

United States District Judge